Supreme Court, U.S.
FILED
AUG 13 1998
OFFICE OF THE CLERK

(3)

NO. 97-1938

IN THE UNITED STATES SUPREME COURT

OCTOBER, 1997 TERM

GREG D. BIAGI and LISA BIAGI,

Petitioners,

v.

UNITED STATES FOREST SERVICE,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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ARGUMENT

A. The Question of Whether the Substance or Form of Federal Agency Action Governs NEPA's Applicability is Squarely Presented

Respondent's Brief in Opposition presents the argument that NEPA does not apply to the reopening of the Welch Creek Road because "[n]either the expiration of the Elliott special use permit nor the Forest Service's refusal to issue a new permit is federal 'action' within the meaning of NEPA." Respondent's Opposition, at 8. Thus, the Forest Service continues to argue that NEPA does not apply to the decision to reopen the Welch Creek Road because the reopening is solely a function of the agency's "refusal to issue a permit." *Id.*

In considering this issue, the Court should be aware that the record in this case does include an explicit written statement by the Forest Service, issued after the Biagis applied for the seemingly routine transfer of the Elliott special use permit, which indicates that the Forest Service approved the continuing "closed" status of the Welch Creek Road.[1] This written statement was issued on September 17, 1990. More than five years later, the Forest Service without complying with NEPA made a decision to reopen the Welch Creek Road.

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[1]Pursuant to Supreme Court Rule 14.1(h)(vi), the full text of this written statement, which appears in the record as ER Tab 33, pp. 58-59, is included as petitioner's Appendix C following this brief.

Thus, the issue which is squarely before the Court in this case is whether or not NEPA's requirements depend on the form of the Forest Service's decision (which the Forest Service characterizes as the "denial" of the application for transfer of the Elliott permit) or whether NEPA's application instead flows from the actual effect of the Forest Service's decision, which is to reopen a road closed for environmental reasons for the past fifteen years.

Another issue presented by the Opposition is whether or not it matters that the gate which closes the Welch Creek Road is "private" or "public" property as a matter of property law. The Forest Service argues that because the gate itself is technically "private" property,[2] its continued presence is a law violation which the Forest Service can remedy without implicating NEPA. Respondent's Opposition, at 9-10. In petitioners' view, this argument entirely begs the question. Regardless of whether the ownership of the gate is "private" or "public," the issue presented is whether or not NEPA must be followed before a decision to remove the gate is made by the Forest Service, a federal agency.

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[2]For reasons of economy, the Forest Service in 1981 required the landowner who wished to use the Welch Creek Road to install and maintain the gate closing that road. Thus, although required as a condition of the permit to use the road the gate itself appears to be technically "private" property.

B. The Question of Whether or Not the Applicability of NEPA Requires Federal Action Which Is In Some Sense Major in Addition to Having Potentially Significant Environmental Effects Is Also Squarely Presented

Respondent is incorrect in arguing, Respondent's Brief, at 10, that this case presents no occasion to take up the question of whether or not NEPA's applicability requires federal action which is in some sense "major" in scope. As demonstrated by the decision of the District Court in this case, the issue is indeed squarely presented.

Respondent's Opposition does not in any way dispute the detailed evidence petitioners placed before the District Court, most notably the Forest Service's own published Watershed Analysis, which shows that the reopening of the Welch Creek Road threatens adverse environmental consequences which are very significant.

The District Court in this case rejected respondent's argument that the couching of the Welch Creek Road reopening as the "denial" of a permit precludes review under NEPA. Therefore, the District Court reached the further issue of whether or not the substance of the decision, which is to reopen the one-mile Welch Creek Road segment that has been closed for fifteen years, triggers NEPA. The District Court granted summary judgment in favor of respondent exclusively on the holding that this action, even though potentially significant in terms of its environmental effects, was not large enough in scope to qualify as "major federal action" within the meaning of the governing statute, 42 U.S.C. § 4332. Petition for Writ of Certiorari, App. A,

pp. 10-11.

However, the District Court was uncertain enough about its resolution of this issue that it granted a stay pending appeal of the reopening of the Welch Creek Road, which continues in effect at this time. ER Tabs 51, 52. The stay was based on the District Court's explicit conclusion that a serious question is presented "particularly on the importance of whether or not it's a major federal action." ER Tab 51, at 9. This points up the need for clarification from this Court regarding the proper interpretation of NEPA in this regard.

CONCLUSION

The Court should grant petitioners' petition for a writ of certiorari.

Dated: August 11, 1998.

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APPENDIX C: LETTER FROM GILBERT H. EASTER, JR., DISTRICT RANGER, TO GREG D. BIAGI DATED SEPTEMBER 17, 1990 [ER TAB 33, pp. 58-59]

Reply to: 7700

Date: Sept. 17, 1990

Greg D. Biagi
676 Scotland Court
Santa Rosa, CA 95409

Dear Greg:

This letter acknowledges receipt of your application for a road use permit on a portion of road 20N01E which accesses your Faraway Ranch property. I have also received an application from Jack Stout who has an easement across your property. Both applications appear to be complete. I am expecting permits to be issued to both applicants. The permits will require the permittees to work together to perform neccessary road maintenance to prevent resource damage. Because the road is very close to Soda Creek timely road maintenance is very important. Prior to the decision on issuance of the road use permits, this letter will serve as authorization to maintain the gate and use the road behind the gate. Jack Stout will be receiving a letter similar to this one and will have the same rights to maintain the gate and use the road.

There may be some misunderstanding of permittee rights and the Forest Service role in Road Use Permits. Road Use Permits are issued to:

(1) permit commercial hauling on a Forest Service road
(2) allow use on a Forest Service road not open to Public use.

Approximately 25% of the Upper Lake District road system is in nonuse status (road maintenance Level I) and barriered or gated to prevent public use. Road maintenance needs on the nonuse roads is reduced and there is significant cost savings. The Forest Service may allow property owners to use Level I roads and still prohibit public use. This is accomplished by issuing a Road Use Permit [situation (2) above] which requires the land owner to perform the added road maintenance generated by the landowner's use. As I have already discussed, when there are two or more land owners the Forest Service issues permits to each land owner and requires them to work together. Occasionally this procedure does not work and the landowners cannot/will not work together and resource damage occurs. When that situation occurs, the Forest Service can require a performance bond to repair the damage. In addition the Forest Service can revolk the road use permits for nonperformance. The road then may be closed to all use or opened to public use with the Forest Service performing the maintenance.

If there are any questions during the processing of your application, I will call you. If you have any questions, feel free to call me during business hours at (707) 275-2361.

Sincerely,

GILBERT H. EASTER, Jr.
District Ranger